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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBERT CAMPBELL, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX

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CASE NO. 95-CR-81192
01-CV-73211-DT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

v.

ROBERT CAMPBELL,
Defendant/Movant.

Filed January 25, 2002

JUDGE ARTHUR J. TARNOW
MAGISTRATE JUDGE PAUL J. KOMIVES

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I. RECOMMENDATION: The Court should deny defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

II. REPORT:

A. Procedural Background

Defendant/movant Robert Campbell is a federal prisoner confined at the Federal Correctional Institution in Cumberland, Maryland. Defendant was charged in this Court in a multiple count, multiple person indictment with various drug offenses. After two trials which ended in hungjuries, defendant was convicted following his third trial of conspiracy to possess with intent to distribute controlled substances, 21 U.S.C. §§ 841(a), 846; and two counts of possession with intent to distribute controlled substances and aiding and abetting the same, 18 U.S.C. § 2, 21 U.S.C. § 841(a)(1). Defendant was sentenced to a term of 324 months' imprisonment.

Defendant appealed his conviction and sentence to the United States Court of Appeals for the Sixth Circuit. He raised the following claims: (1) prosecutorial misconduct; (2) improper admission of videotape evidence and notes from an interviewing police officer; (3) improper admission of an attorney's testimony; (4) improper jury instructions; (5) violation of the Speedy

Trial Act and ineffective assistance of counsel by counsel's failure to assert this claim prior to trial; (6) insufficient evidence; and (7) improper determination of drug quantity at sentencing. The court of appeals found no merit in these claims, and affirmed the conviction and sentence. See United States v. Campbell, No. 98-2174, 2000 WL 1597858, at *3-*6 (6th Cir. Oct. 19, 2000).

On August 20, 2001, defendant, through counsel, filed this motion to vacate his sentence pursuant to 28 U.S.C. § 2255. As grounds for relief, defendant raises 13 instances of ineffective assistance of counsel: (1) failure to move for dismissal under the Speedy Trial Act (Ground 1); (2) failure to establish grounds for a downward departure at sentencing (Ground 111); (3) failure to object to a reference to organized crime (Ground IV.A); (4) prejudicial remarks to the jury (Ground IV.B); (5) failure to propose a defense theory jury instruction (Ground IV.C); (6) failure to call character witnesses (Ground IV.D); (7) eliciting of prejudicial testimony (Ground IV.E); (8) failure to object to jury instructions (Ground IV.F); (9) failure to impeach witness Orlando Bayless (Ground IV.G); (10) failure to object to the prosecutor's improper remarks during closing argument (Ground V); (11) failure to adequately object to the admission of a videotaped statement and admission of testimony from the police officer who took the statement (Ground VI); (12) failure to object to testimony by the attorney for witness Carol Bayless (Ground VII); and (13) failure to object to erroneous jury instructions (Ground VIII). Defendant also contends that he was denied a fair trial by the cumulative effect of counsel's errors (Ground IX). Finally, defendant raises one claim not based on the ineffective assistance of counsel: his sentence violates

the rule of Apprendi v. New Jersey, 530 U.S. 466 (2000) (Ground II).

The government filed its response on December 17, 2001. The government argues that many of defendant's ineffective assistance of counsel claims are barred by his failure to raise the claims on direct appeal, or by the court of appeals's rejection of the claims. The government also argues that the remaining ineffective assistance claims are without merit, and that Apprendi does not apply retroactively to this conviction. On January 22, defendant filed a reply to the government's response. For the reasons that follow, the Court should deny defendant's motion to vacate his sentence.

B. Procedural Default and Law of the Case

1. Procedural Default

The government contends that many of defendant's ineffective assistance of counsel claims are barred because he did not raise them on his initial appeal. Thus, the government argues, the claims are procedurally defaulted. The Court should disagree. Generally, the court of appeals will not consider ineffective assistance of counsel claims on direct appeal. Rather, the appropriate vehicle for raising an ineffective assistance of counsel claim is a § 2255 motion in the trial court. See United States v. Long, 190 F.3d 471, 478 (6th Cir. 1999); United States v. Pruitt, 156 F.3d 638, 646 (6th Cir. 1998). Thus, an ineffective assistance of counsel claim is "properly raised for the first time in [a] § 2255 motion." Hall v. United States, No. 97-5936, 1998 WL 887276, at *2 (6th Cir. Dec. 9, 1998); see also, Hunter v. United States, 160 F.3d 1109,

1115 (6th Cir. 1998) (addressing ineffective assistance claim "brought for the first time in a section 2255 proceeding."), Accordingly, the Court should conclude that defendant's ineffective assistance of counsel claims are not procedurally defaulted.

2. Law of the Case

The government also contends that those ineffective assistance claims which are premised upon substantive issues decided by the Sixth Circuit in defendant's direct appeal are barred by the law of the case doctrine. The law of the case doctrine, which is applicable in criminal proceedings, prohibits a lower court from redeciding issues already determined by a higher court in the same case. See United States v. Moored, 38 F.3d 1419, 1421-22 (6th Cir. 1994). Thus, issues which were addressed by the Sixth Circuit and decided against a defendant on direct appeal may not be relitigated in a § 2255 proceeding. See DuPont v. United States, 76 F.3d 108, 110 (6th Cir. 1996); Gonzales v. United States, 929 F. Supp. 252, 255 (E.D. Mich. 1996) (Gadola, J.) (citing Stephen v. United States, 496 F.2d 527, 528-29 (6th Cir. 1974)).

To the extent that the government argues defendant's ineffective assistance claims are barred in toto, the government's argument is without merit. "An ineffective assistance claim is analytically distinct from the substantive claim underlying it." Bailey v. Nagle, 172 F.3d 1299, 1304 n.8 (11th Cir. 1999); see, e.g., Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) (noting that ineffective assistance claim based on counsel's failure to file motion to suppress was distinct from the underlying Fourth Amendment claim). Thus,

the law of the case doctrine does not bar the Court from considering defendant's ineffective assistance claims. Cf. Hunter, 160 F.3d at 1115 (considering ineffective assistance of counsel claim even though underlying substantive claim was procedurally defaulted, and thus not considered).

However, to the extent that the Sixth Circuit actually decided issues relevant to the ineffective assistance of counsel claims, the Court is bound by those determinations. Thus, for example, the Sixth Circuit's determination that a particular comment by the prosecutor was not improper is binding on this Court, and will inform the analysis of whether counsel was ineffective for failing to object to that comment.

C. Legal Standard

The substantive provisions of § 2255, which were not altered by the recently enacted Antiterrorism and Effective Death Penalty Act of 1996, provide that a federal prisoner "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside, or correct the sentence." 28 U.S.C. § 2255 para. 1. Thus, a defendant may be entitled to § 2255 relief if his conviction or sentence violates either the Constitution or a federal statute. However, In order to obtain relief under § 2255 on the basis of a nonconstitutional--i.e., statutory or rule-error, the record must reflect a fundamental defect in the proceedings which inherently causes a miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure. Reed v.

Farley, 512 U.S. 339, 348 (1994) (Ginsburg, J.); id. at 355-56 (Scalia, J.); United States v. Todaro, 982 F.2d 1025, 1028 (6th Cir. 1993) (per curiam). As the Seventh Circuit explained:

Where "mere statutory violations are at issue," as here, the Supreme Court has recently held that § 2255 can only avail a petitioner if the alleged error spawned a "'fundamental defect which inherently results in a complete miscarriage of justice.'" Federal courts lack the power under § 2255 to rectify errors that fall short of "vitiat[ingl the sentencing court's jurisdiction or are otherwise of constitutional magnitude."

Broadway v. United States, 104 F.3d 901,903 (7th Cir. 1997) (quoting, respectively, Reed, 512 U.S. at 348 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)) (citations omitted), and Guinan v. United States, 6 F.3d 468, 470 (7th Cir. 1993)) (citations omitted) (alteration in original).

D. Ineffective Assistance of Counsel Claims

1. Legal Standard

The Sixth Amendment right to counsel and the corollary right to effective assistance of counsel protect the fundamental right to a fair trial. See Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish the ineffective assistance of counsel, defendant must show that: (1) counsel's errors were so serious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) counsel's deficient performance prejudiced the defense. Id. at 687. These two components are mixed questions of law

and fact. See id. at 698. Further, "[t]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697. If "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . , . that course should be followed." Id.

With respect to the performance prong of the Strickland inquiry, a strong presumption exists that counsel's behavior lies within the wide range of reasonable professional assistance. See id. at 689; O'Hara v. Wigginton, 24 F.3d 823, 828 (6th Cir. 1994). "[D]efendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (citation omitted). "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. With respect to the prejudice prong, the reviewing court must determine, based on the totality of the evidence before the factfinder, "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695.

As noted above, defendant raises 13 separate claims of ineffective assistance of counsel. For ease of analysis, rather than addressing them in the order presented by defendant, I have grouped the claims into four general areas: pre-trial, trial, jury instructions, and sentencing.

2. Pre-Trial. Failure to Raise Speedy Trial Act Claim (Ground I)

Petitioner first contends that counsel was ineffective for failing to move to dismiss the indictment for violation of the Speedy Trial Act. The Sixth Circuit did not address the merits of the underlying substantive claim, concluding that the issue was waived and that petitioner's ineffective assistance claim based on the Speedy Trial Act should by brought in a § 2255 motion. See Campbell, 2000 WL 1597858, at *6. Thus, none of the issues relevant to this claim have been decided already by the Sixth Circuit.

The Speedy Trial Act requires that a criminal defendant be brought to trial within 70 days of either the filing of an indictment or an arraignment, whichever is later. See 18 U.S.C. § 3161(c)(1). If a defendant is retried following a judge's declaration of a mistrial, the retrial must begin "within 70 days from the date the action occasioning the retrial becomes final." 18 U.S.C. § 3161(e). If a defendant is not brought to trial within 70 days, taking into account excludable periods under the Act, the indictment "shall be dismissed on motion of the defendant," either with or without prejudice. 18 U.S.C. § 3162(a)(2); see also, United States v. Jenkins, 92 F.3d 430, 438 (6th Cir. 1996).

Defendant contends that the Act was violated in three ways, and that counsel was ineffective for failing to move to dismiss on each of these occasions. First, defendant argues that 83 days elapsed between the declaration of a mistrial in his first trial and the commencement of his second trial. Second, defendant

contends that at least 157 days of non-excludable time elapsed between the declaration of a mistrial in his second case and the dismissal of the indictment, on his motion, based on an improperly constituted grand jury. Third, after the dismissal of the indictment and his arraignment on a third superceding indictment, defendant was not brought to trial until 78 days later.

Assuming that there was a violation of the Speedy Trial Act, and that counsel was deficient in failing to raise the issue, defendant is still not entitled to relief on this claim because he cannot establish prejudice. Defendant does not allege that the delay occasioned any prejudice in the preparation of his case, such as a witness becoming unavailable. Thus, the only possible prejudice to defendant would hinge upon the possibility that the motion would have been granted with prejudice, precluding the government from trying him at all. Defendant cannot establish this type of prejudice.

Under the Act, "[i]n determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to dismissal; and the impact of a reprosecution on the administration of [the Act] and on the administration of justice." 18 U.S.C. § 3162(a)(1). Each of these factors would have counseled a dismissal without prejudice in defendant's case. Defendant was charged with involvement and an extensive, serious drug distribution conspiracy, for which he was sentence to nearly 30 years' imprisonment. See United States v. Howard, 218 F.3d 556, 561 (6th Cir. 2000) (looking to length of sentence to determine severity of offense). As to the second factor,

the delays in defendant's case were not extensive and were occasioned in part by the complexity of the procedural issues involved, including two previous hung juries and a reindictment because of an improperly constituted grand jury. Further, there is no evidence of bad faith or any attempt to take advantage of the delay on the part of the prosecution. See id. Finally, as to the third factor, defendant does not allege that he suffered any actual prejudice as a result of the delay, and there is no allegation that the government engaged in any improper behavior which must be deterred in order to insure compliance with the Act. See id. at 561-62, In these circumstances, any dismissal under the Act would have been without prejudice.

Because any dismissal under the Speedy Trial Act would have been without prejudice to the government reinstituting the charges and trying defendant anew, he cannot establish that he was prejudiced by his counsel's failure to file a motion to dismiss. See United States v. Jackson, No. 00-1653, 2001 WL 1042180, at *2 (6th Cir. Aug. 30, 2001) (no prejudice to sustain ineffective assistance of counsel claim where defendant did not "demonstrate[] a reasonable probability that the district court would have dismissed the indictment with prejudice."); United States v. Theurer, No. 93-3310, 1994 WL 420072, at *7 (7th Cir. Aug. 11, 1994); United States v. LeFlore, No. 88-1426, 1989 WL 40296, at *2 (6th Cir. Apr. 25, 1989) (Merritt, J., concurring); Harvey v. United States, 850 F.2d 388, 402-03 (8th Cir. 1988); United States v. Cook, 48 F. Supp. 2d 776, 777 (N.D. Ill. 1999); Patiwana v. United States, 928 F. Supp. 226, 240 (E.D.N.Y. 1996). Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

3. Trial

Defendant next raises numerous allegations of ineffective assistance of counsel in connection with counsel's performance during trial.

a. Failure to Object to Reference to Organized Crime (Ground IV.A)

Defendant first contends that counsel was ineffective for failing to object and move for a mistrial after government witness Richard Carroll, a New York City police officer, testified that at the time of his testimony he was assigned to the Organized Crime Control Bureau, See Trial Tr., dated 7/16/98. The Court should conclude that defendant is not entitled to relief on this claim.

Although defendant contends that this remark was "irrelevant, inflammatory and prejudicial," Def.'s Br., at 22, he does not state how he was prejudiced by this single reference to organized crime. Notably, the comment was in no way connected with his case, but was simply part of background testimony concerning the witness's current employment. Nowhere in his testimony did Carroll relate any of the allegations against defendant to organized crime, and he also testified that he was assigned to the Street Crime Unit, not the Organized Crime Control Bureau, at the time he arrested coconspirator Carol Bayless. Thus, there is not a reasonable probability that the comment influenced the jury's verdict in any manner. See, e.g., United States v. Catalano, No. 91-50372, 1992 WL 212322, at *2 (9th Cir. Sept. 3, 1992) (per curiam) (defendant not denied a fair trial by prosecutor's

comments concerning organized crime where references were isolated and not inflammatory); United States v. Thirion, 813 F.2d 146, 156 (8th Cir. 1987) (defendant not denied a fair trial by question relating to whether defendant, an attorney, had represented an organized crime figure; the matter came up only once during the course of a lengthy trial and defendant's answer linked the client, and not defendant, to organized crime); United States v. Wilson, 598 F. Supp. 138, 143 (E.D. Pa. 1984) (prosecutor's statement in closing argument that organized crime leader lived in a rowhouse made in response to defense counsel's argument that defendant could not have been leader of drug ring because defendant lived in a small rowhouse did not link the defendant to organized crime; prosecutor made no actual attempt to link the defendant to organized crime and the remark was an isolated one), Accordingly, the Court should conclude that petitioner is not entitled to relief on this claim.

b. Prejudicial Remarks to Jury (Ground IV.B)

Defendant next contends that counsel was ineffective for making prejudicial remarks to the jury. Specifically, during opening statement and closing argument counsel indicated a lack of concern for the jury's verdict, telling the jury, for example, that "[y]ou are here to seek the truth. What the heck is the truth? Is Robert Campbell guilty? If he is, convict him. If he's not, let him go." Trial Tr., dated 7/17/98, at 14-15. Defendant contends that these types of statements by counsel indicated a lack of concern in the verdict and a disbelief of defendant's own testimony.

On the contrary, counsel repeatedly emphasized the burden of proof, requiring the prosecutor to prove the charges against petitioner beyond a reasonable doubt. He also repeatedly stated that, in his view and for reasons he explained at length to the jury, the prosecutor had not met this burden. While counsel's discussion of the burden of proof was perhaps not as eloquent as it could have been, counsel at all times acted as an advocate for defendant and pressed defendant's case. In these circumstances, the comments of counsel do not amount to constitutionally ineffective assistance. See United States v. Williamson, 53 F.3d 1500, 1510-12 (10th Cir. 1995). Accordingly, the Court should conclude that petitioner is not entitled to relief on this claim.

c. Failure to Call Character Witnesses (Ground IV.D)

Defendant next argues that counsel was ineffective for failing to call character witnesses who would have bolstered his testimony at trial by testifying to his reputation for truthfulness. This claim fails for two reasons.

First, it is unlikely that such character evidence would have been admissible. The Federal Rules of Evidence provide that "evidence of truthful character [of a witness] is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Fed. R. Evid. 608(a)(2). Although the prosecution certainly attacked defendant's truthfulness in this case through cross-examination and other evidence, defendant has pointed to nothing in the record showing that the government attacked his character for truthfulness, as required for

his character evidence to have been admissible. It is well established that "[v]igorous cross examination and/or the fact that a witness is contradicted by other evidence in the case does not constitute such an attack," United States v. Thomas, 768 F.2d 611, 618 (5th Cir. 1985); see also, United States v. Dring, 930 F.2d 687, 691-92 (9th Cir. 1991); United States v. Danehy, 680 F.2d 1311, 1314 (11th Cir. 1982). Thus, it is unlikely that such evidence would have been admitted, and defendant cannot show that counsel was ineffective.

Second, defendant has provided no information regarding this testimony that he says counsel should have presented. He has identified no specific witnesses, nor detailed what their testimony would have been. Because defendant has failed to detail what witnesses should have been examined more fully or what additional witnesses should have been called, he is unable to rebut the strong presumption that his counsel's actions were the product of sound trial strategy. See Porter v. Singletary, 883 F. Supp. 660, 667 (M.D. Fla. 1995). Likewise, "[w]ithout producing or otherwise detailing the witnesses' testimony, the petitioner's claim essentially relies on speculation about what unidentified persons might have said, and such a showing fails to carry [his] burden to show prejudice." Veal v. Cooper, 936 F. Supp. 511, 51415 (N.D. Ill. 1996) (internal quotation omitted) (citation omitted). Accordingly, the Court should conclude that defendant is not entitled to relief on this ground.

d. Eliciting of Prejudicial Testimony (Ground IV.E)

Defendant next argues that counsel was ineffective for eliciting prejudicial testimony from government

witnesses. However, after examining the isolated questions asked by counsel and identified as error by defendant in context, the Court should conclude that counsel was not ineffective.

Defendant first contends that counsel erred by asking a DEA agent whether, during surveillance of a motel where a drug exchange was occurring, the agent thought that the two people in a Mercury Villager automobile (which included defendant) were involved in the transaction. The agent responded, "Definitely." See Trial Tr., dated 7/20/98, at 48. However, it is clear from the questions preceding and following this one question that counsel was casting doubt on the agent's belief. Counsel was attempting to show that the agent's belief was not credible given that he did not have the Villager followed by another agent when it left the motel parking lot. Counsel asked a number of questions establishing this fact, as well as the fact that the agent did not see defendant carrying anything either to or from the room in which the other conspirators were apparently conducting the transaction. See id at 45-51. Taken in context, counsel was not ineffective for eliciting this testimony.

Second, during cross-examination of a Sterling Heights police officer working with the DEA on the surveillance, counsel followed up on the officer's direct examination testimony. During direct examination, the officer testified that he recognized defendant from a photograph he had previously seen. See id. at 54. During cross-examination, counsel asked the officer where he had seen the photograph. The officer responded that he had seen the picture in a home that had been the subject of a prior narcotic raid. See id. at

61. Although this answer was probably not what counsel had hoped for, counsel adopted a legitimate strategy in attempting to question the officer's observations and identification of defendant.

Finally, during the cross-examination of another DEA agent, counsel attempted to elicit from the agent that he was relying primarily on the word of the government witnesses. After admitting this to be the case, the agent slipped in that he was relying "[n]ot solely [on] the fact of the people that you were discussing." See id. at 97-98. This isolated statement came after counsel elicited repeatedly from the agent that he was, in fact, relying primarily on the word of the government witnesses, and that he had no independent evidence, through surveillance, to indicate that defendant was involved in the crime. See id. In light of counsel's successful cross-examination, it is difficult to see how this isolated statement would have, in defendant's view, lead the jury to conclude that there were other witnesses who did not testify.

"In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). Because "the conduct of examination and cross-examination is entrusted to the judgment of the lawyer," a reviewing court "on a cold record should not second-guess such decisions unless there is no strategic or tactical justification for the course taken." United States v. Luciano, 158 F.3d 655, 660 (2d Cir. 1998). While counsel's questions to the witnesses may illustrate "a classic example of the first rule of cross-

examination; don't ask a question unless you know what the answer will be," State v. Boradnax, No. 18169, 2001 WL 127779, at *2 (Ohio Ct. App. Feb. 16, 2001), the only issue for the Court is "whether counsel's conduct in asking the question fell below an objective standard of reasonableness." Id. As discussed above, each of the questions was part of a vigorous cross-examination and based on a legitimate strategy of attempting to undermine the witness's direct examination testimony. Defendant therefore has failed to show that counsel's performance was deficient, and the Court should conclude that he is not entitled to relief on this claim.

e. Failure to Impeach Orlando Bayless (Ground IV. G)

Defendant also argues that counsel was ineffective for failing to properly impeach government witness and co-conspirator Orlando Bayless during cross-examination. Defendant contends that Bayless should have been impeached regarding inconsistencies between his testimony at defendant's second and third trials concerning the amount of money defendant contributed to purchase the drugs. He also contends that Bayless should have been impeached with the statement he initially gave to the police denying any knowledge of the money seized by the police.

It is true that counsel could have chosen to attack Bayless through the inconsistencies in his testimony. However, the inconsistencies identified by defendant were relatively minor, addressing whether defendant had brought $70,000 or $80,000 to the motel. Counsel instead chose to focus his attack on Bayless on the substantial sentence reduction Bayless was hoping to receive in exchange for his testimony, and on Bayless's

significant drug related activity. This was a reasonable trial strategy. Further, defendant is unable to establish that he was prejudiced by counsel's failure to question Bayless about these minor inconsistencies. Counsel's "'actual cross cast a general shadow over [Bayless's] character and veracity by bringing out his drug [dealing] and hinting at a motive for lying in the form of [Bayless's plea agreement with the government and expected lenient sentence]. The court cannot imagine that a jury unpersuaded by this information would have rejected [Bayless's] testimony based on inconsistencies in some rather minor details.'" Johnson v. Alabama, 256 F.3d 1156, 1186 (11th Cir. 2001) (quoting trial court's opinion at Johnson v. Nagle, 58 F. Supp. 2d 1303, 1356 (N.D. Ala. 1999)). Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

f. Failure to Object to Videotaped Statement/Officer Testimony (Ground VI)

Defendant next contends that counsel was ineffective for failing to properly object to the admission of a videotaped statement by Carol Bayless and the notes of the officer who interrogated her. However, the court of appeals found that this testimony was properly admitted because defense counsel had attacked Bayless's testimony, asking whether she had filed an affidavit claiming that her confession had been coached, and was not truthful. Thus, the evidence was admissible "to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]" Fed. R. Evid. 801(d)(1)(B); see Campbell, 2000 WL 1597858, at *4-*5. Because the court of appeals's conclusion that the evidence was admissible is

binding on this Court, defendant cannot show that counsel was ineffective for failing to object, or that he was prejudiced by counsel's failure. Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

g. Failure to Object to Testimony of Attorney (Ground VII)

Defendant next contends that counsel was ineffective for failing to object to the testimony of Joyce London, the appointed counsel for Carol Bayless. The court of appeals concluded that this testimony was relevant, and did not amount to improper bolstering of Bayless because "London did not testify that she had corroborated any of Carol's testimony nor did she either state or imply that she believed Carol's testimony was truthful," Campbell, 2000 WL 1597858, at *5. Again, this conclusion is binding on this Court, and defendant therefore cannot show either that counsel was deficient or that he was prejudiced by counsel's failure to object. Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

h. Failure to Object to Prosecutorial Misconduct (Ground V)

Defendant next contends that counsel was ineffective for failing to object to several instances of prosecutorial misconduct. Specifically, defendant argues that the prosecutor improperly vouched for the credibility of the witnesses, expressed his personal opinion of defendant's guilt, and made inflammatory emotional appeals. Again, however, the court of appeals rejected

the merits of each of these underlying claims of prosecutorial misconduct. While it is true that the court did so under the plain error standard of review because defendant failed to object, it is clear from the language used by the court that it found no error, plain or otherwise. The court concluded that the prosecutor's remarks regarding the credibility of the witnesses were based on the evidence and were proper because they were "made in the context of responding to the defendant's suggestion that the witnesses were required to incriminate Robert in order to get the prosecutor to ask for a sentence reduction." Campbell, 2000 WL 1597858, at *3; see also, Darden v. Wainwright, 477 U.S. 168, 182 (1986) (one factor in evaluating claims of prosecutorial misconduct is whether the prosecutor's statement was "invited by or was responsive to the [closing argument] of the defense.").

The prosecutor's argument with respect to Carol Bayless's testimony was likewise not improper, because it was merely a summation of the evidence from which the prosecutor asked the jury to draw the conclusion that her testimony was credible. See Campbell, 2000 WL 1597858, at *3; See, e.g., Nichols v. Scott, 69 F.3d 1255, 1283 (5th Cir. 1995) (comment "is permissible to the extent that it draws a conclusion based solely on the evidence presented.") (internal quotation omitted); United States v. Grey Bear, 883 F.2d 1382, 1392 (8th Cir. 1989); Martin v. Foltz, 773 F.2d 711, 717 (6th Cir. 1985) (prosecutor may argue permissible inferences from the evidence); United States ex rel. Williams v. Washington, 913 F. Supp. 1156, 1163 (N.D. Ill. 1995) (prosecutor's assertion during closing argument that the defendant had "lied" did not deprive petitioner of a

fair trial where "the prosecution's statements were reasonable inferences drawn from the physical evidence and witness testimony[.]"); Miller v. White, No. C-93-20648 RPA, 1994 WL 621671 (N.D. Cal. Oct. 17, 1994) (a prosecutor "is privileged to argue to the jury that it was his opinion formed from deductions made from evidence adduced at the trial that the defendant was guilty of the crime charged.") (internal quotation omitted).

Finally, the court of appeals concluded that the prosecutor's appeal to the jury's emotions, even if improper, did not prejudice defendant because they were isolated remarks which merely emphasized that the discovery of the conspiracy was fortuitous. See Campbell, 2000 WL 1597858, at *4. In light of the court of appeals's resolution of defendant's substantive prosecutorial misconduct claims, defendant cannot show that counsel was deficient or that he was prejudiced by counsel's failure to object. Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

4. Jury Instructions

In his next set of claims, defendant contends that counsel was ineffective in connection with the jury instructions given by the Court.

a. Failure to Propose Defense Theory Instruction (Ground IV.C)

Defendant first contends that counsel was ineffective for failing to request that the Court instruct the jury on the defense theory of the case. However, defendant

cannot show that he was prejudiced by counsel's failure because his theory was adequately conveyed to the jury by the Court's instructions on the elements of the government's charges and the burden of proof. Defendant's theory of the case was a simple denial of involvement in the conspiracy. "Where the theory is a denial of the charge, the theory is adequately presented by instructions on the burden of proof of each element and on the presumption of innocence." United States v. Pruitt, 719 F.2d 975, 978 (9th Cir. 1983); see also, United States v. Mack, 159 F.3d 208, 218 (6th Cir. 1998) (trial court did not err in failing to give defense theory instruction because requested instruction was merely "a categorical denial of the charges contained in the indictment[,]"). Thus, defendant cannot show that he was prejudiced by the omission of a defense theory instruction. Cf. Moreno v. United States, No. 93-1074, 1993 WL 443824, at *3 (1st Cir. Nov. 3, 1993) (counsel not ineffective for failing to request special instructions where defendant presented reasonable doubt defense). Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

b. Failure to Object to Court Security Officer Reference (Ground IV.F)

Defendant also argues that the Court erred in referring to the presence of court security officers, and that counsel consequently was ineffective for failing to object to this reference. The Court should conclude that defendant is not entitled to relief on this claim. The Court's brief reference, at the start of voir dire, was in the context of explaining the roles of the various people seated in the courtroom. In this context, it is not likely, as defendant suggests, that the prospective jurors

viewed the Court's statement as an indication that defendant was a violent person, or that the brief statement at the start of the trial impacted the jury's deliberations after several days of testimony. Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

c. Failure to Request Unanimity Instruction (Grounds IV.F and VIII.A)

Defendant next contends that counsel was ineffective for failing to request an instruction regarding unanimity on the conspiracy charge. Because the conspiracy charge related to both heroin and cocaine, defendant contends that the jury should have been instructed that they had to unanimously find that he conspired to possess with intent to distribute heroin, or that they had to unanimously find that he conspired to possess with intent to distribute cocaine. He contends that the Court's instruction allowed the jury to convict if all jurors concluded he conspired to possess a controlled substance, even if they were less than unanimous with respect to which substance was actually involved.

Defendant is not entitled to relief on this claim for two reasons. First, the Sixth Circuit rejected the underlying substantive claim on defendant's direct appeal. The court explained: "[S]pecific unanimity is required only where the evidence is exceptionally complex, if there is a variance between the indictment and the proofs at trial, or if there is a 'tangible indication of jury confusion.' There were no such complex circumstances in this case." Campbell, 2000 WL 1597858, at *5 (citation omitted) (quoting United

States v. Washington, 127 F.3d 510.513 (6th Cir. 1997)). Second, defendant cannot show that he was prejudiced by the omission of this instruction. The jury unanimously convicted defendant of the underlying substantive offenses, charged in two separate counts, of aiding and abetting others to possess with intent to distribute both heroin and cocaine. Thus, it is clear that the jury unanimously believed that defendant was engaged in both the heroin and cocaine distribution portions of the conspiracy. See United States v. Stewart, 185 F.3d 112, 127-28 (3d Cir. 1999) (failure to give instruction regarding unanimity necessary for finding predicate acts for RICO violation harmless in light of jury verdict finding defendant guilty of all underlying substantive predicate acts in the indictment).fn1 Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

d. Failure to Object to Sentencing Guidelines Instruction (Grounds IV.F and VIII.B)

Defendant next contends that his counsel was ineffective for failing to object to the Court's instruction to the jury regarding the functioning of the United States Sentencing Guidelines, specifically as they related to the Rule 11 plea agreements with the government witnesses. Counsel withdrew his objection to these instructions, however, because he argued during his closing argument that the government witnesses had an incentive to lie in their trial testimony in order to receive a downward departure during their own sentencing. In light of defendant's attacks on the credibility of the witnesses who had reached plea agreements with the government, and the fact that the instructions were an accurate statement of the law, "[i]t

is difficult to see how the instruction could have prejudiced the defendant[]." United States v. Daniels, 986 F.2d 451, 458, superseded on reh'g on other grounds, 5 F.3d 495 (11th Cir. 1993). Accordingly, the Court should conclude that defendant is not entitled to relief on this claim.

5. Sentencing (Ground III)

Defendant next contends that counsel was ineffective for failing to request a downward departure at sentencing based on his post-offense conduct and based on the disproportionality between his sentence and those of his testifying codefendants. However, defendant cannot establish that he would have been entitled to a downward departure on these bases, and thus he cannot show that he was prejudiced by counsel's performance.

The Sentencing Guidelines provide that "the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" U.S.S.G. § 5K2.0 (quoting 18 U.S.C. § 3553(b)), The Guidelines also include a list of factors that are ordinarily not relevant to a determination to depart from the guidelines, see U.S.S.G. §§ 5H1.1-.12, and a list of factors which may be relevant to depart, either upward or downward, from the appropriate guidelines sentence, see U.S.S.G. §§ 5K2.1-.21. See generally, Koon v. United States, 518 U.S. 81, 92-96 (1996). A sentencing court "must bear in

mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be 'highly infrequent.'" Koon, 518 U.S. at 96.

Neither post offense behavior nor disproportionality are mentioned in the Guidelines as a basis for departure. Nor would a departure on either of these bases have been appropriate. While post-offense, pre-sentencing behavior may be a permissible basis for a downward departure, this is the case only where post-offense rehabilitation is "present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility adjustment is granted." United States v. Brock, 108 F.3d 31, 35 (4th Cir. 1997), quoted in United States v. Biehl, No. 98-3318, 1999 WL 98600, at *2 (6th Cir. Jan. 25, 1999) (per curiam). Here, defendant merely abided by the terms of his bond conditions and refrained from engaging in further criminal activity. Such routine conduct does not take defendant's case out of the "heartland" of cases crafted by the Guidelines. As the Sixth Circuit explained in Biehl:

Some degree of presentence rehabilitation is to be expected from a penitent defendant, whether due to a true acceptance of responsibility or from one who simply wants to "put his best foot forward" at sentencing with hopes of receiving leniency from the sentencing court. Furthermore, in order to keep the temporary liberty defendant was given by [being released on bond], abiding by the fairly typical terms of his presentence release is not unexpected. As the First Circuit stated, "such predictable reactions, while laudable, fall shy of what we believe is necessary to take cases out of the heartland."

Biehl, 1999 WL 98600, at *3 (quoting United States v. Sklar, 920 F.2d 107, 117 (1st Cir. 1990)).

Likewise, defendant would not have been entitled to a downward departure based on the disparity between his sentence and those given to his codefendants who pleaded guilty. As the courts have explained, it would be impermissible under the Sentencing Guidelines for the Court to depart downward in an attempt to make defendant's sentence the same as his codefendants':

> [I]t is axiomatic that a proper application of the Sentencing Guidelines determines the relative culpability of a defendant for purposes of sentencing . . . . Departures based on "relative culpability" would allow district courts to ignore their own factual determinations.

United States v. Perkins, 108 F.3d 512, 516 (4th Cir. 1997); see also, United States v. Withers, 100 F.3d 1142, 1149 (4th Cir. 1996) ("The circuits unanimously agree that disparate sentences among codefendants is an impermissible ground for depature.") (citing cases from every circuit); United States v. Epley, 52 F.3d 571, 583-84 (6th Cir. 1995).

In short, defendant would not have been entitled to a downward departure upon either basis which he asserts counsel should have advanced at sentencing. He thus cannot show that he was prejudiced by counsel's actions in connection with his sentencing, and the Court should accordingly conclude that defendant is not entitled to relief on this ground.

6. Cumulative Error

Defendant also contends that he was denied a fair trial by the cumulative effect of trial counsel's errors. It is true that "[e]rrors which standing alone may be deemed harmless or insufficiently prejudicial to amount to a denial of due process may cumulatively produce a trial setting which is fundamentally unfair." Payne v. Janasz, 711 F.2d 1305, 1316 (6th Cir. 1983) (Jones, J., dissenting); accord Walker v. Engle, 703 F.2d 959, 968 (6th Cir. 1983). This rule, however, applies only to constitutional errors; the accumulation of non-errors cannot collectively amount to a violation of due process. See United States v. Lumpkin, 192 F.3d 280, 290 (2d Cir. 1999); McKinnon v. Ohio, No. 94-4256, 1995 WL 570918, at * 12 (6th Cir. Sept. 27, 1995); Fero v. Kerby, 39 F.3d 1462, 1475 (10th Cir. 1994). As noted and discussed in this section, none of defendant's allegations establish constitutional error, and thus his cumulative error claim fails.

E. Apprendi Claim (Ground II)

Defendant finally contends that his sentence violates the rule established by the Supreme Court in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000). In Apprendi, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 120 S. Ct. at 2362-63. In United States v. Page, 232 F.3d 536 (6th Cir. 2000), the Sixth Circuit held that the Apprendi rule applies to the determination as to the amount of drugs necessary to impose the statutory mandatory minimum sentences

provided in § 841(b)(1). See Page, 232 F.3d at 242-43; see also, United States v. Flowal, 234 F.3d 932, 936 (6th Cir. Dec. 11, 2000).

Every court of appeals to have considered the issue has held that the Apprendi rule does not apply retroactively to cases on collateral review. See United States v. Sanders, 247 F.3d 139, 146-51 (4th Cir. 2001); United States v. Moss, 253 F.3d 993, 997 (8th Cir. 2001); McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001); Jones v, Smith, 231 F.3d 1227, 1238 (9th Cir. 2000); see also, Snyder v. United States, No. 01-1258, 2001 WL 1298954, at *2 (6th Cir. Aug. 7, 2001). Defendant contends that this rule does not apply to him, however, because Apprendi was decided while his appeal was still pending. It is nevertheless not clear whether defendant can raise his Apprendi claim on collateral review. Griffth v. Kentucky, 479 U.S. 314 (1987), upon which defendant relies, holds only "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]" Id. at 328. While this rule would have mandated retroactive application of Apprendi to defendant's criminal trial by the Sixth Circuit on direct appeal, under the current posture defendant's case is not "pending on direct review or not yet final." Further, even if defendant could invoke Apprendi retroactively, his failure to raise the issue on direct appeal constitutes a procedural default. See United States v. Frady, 456 U.S. 152, 167-68 (1982).

In any event, defendant is not entitled to relief on the merits of his Apprendi claim. Under § 841, defendant was subject to no mandatory minimum sentence and to

a maximum sentence of 20 years' imprisonment for his drug conviction. See 21 U.S.C. § 841(b)(1)(C). However, the penalty range increased to a mandatory minimum term of 10 years' imprisonment and a maximum term of life imprisonment if his conviction involved more than 1 kilogram of heroin or more than 5 kilograms of cocaine. See 21 U.S.C. § 841(b)(1)(A). Defendant's sentence of 324 months-27 years-falls into this enhanced sentencing range. Therefore under Apprendi, as interpreted by the Sixth Circuit in Flowal and Page, the quantity of the drugs involved was required to be submitted to the jury and proved beyond a reasonable doubt.

However, this fact alone does not entitle defendant to relief. The Supreme Court has held that "the omission of an element [in a jury instruction] is an error that is subject to harmless-error analysis." Neder v. United States, 527 U.S. 1, 15 (1999). Because, under Apprendi, the quantity of drugs is an element of the offense for an enhanced sentence under § 841(b)(1), this harmless error rule applies in defendant's case. See United States v. Barbosa, 271 F.3d 438, 459 (3d Cir. 2001); United States v. Sanchez, 269 F.3d 1250, 1272 (11th Cir. 2001); United States v. Virgen-Moreno, 265 F.3d 276, 297 (5th Cir. 2001); United Staes v. Mietus, 237 F.3d 866, 875 (7th Cir. 2001); cf. United States v. King, 272 F.3d 366, 378-79 (6th Cir. 2001) (finding, under plain error review, that Apprendi error did not affect defendant's substantial rights, which is "akin to the harmless error analysis employed in preserved error cases,"). Thus, defendant is not entitled to relief on this claim if the failure to submit the quantity determination to the jury was harmless beyond a reasonable doubt.

Here, the fact which increased defendant's statutorily prescribed sentencing range was the amount of heroin or cocaine involved in the conspiracy-either more than one kilogram of heroin or more than five kilograms of cocaine increased the statutorily prescribed range to the range in which defendant was sentenced. Once the jury determined beyond a reasonable doubt that defendant was involved in the conspiracy, it could have had no doubt that the conspiracy involved more than one kilogram of heroin and more than five kilograms of cocaine. Leaving aside any other transactions about which there may have been a dispute, it was undisputed that the police seized 34 kilograms of cocaine and 2 kilograms of heroin from Carol Bayless's car. In other words, "[i]f this jury was going to convict [defendant] at all-which it plainly did-there is simply no way on this record that it could have failed to find that he was conspiring to distribute" one kilogram or more of heroin and five kilograms or more of cocaine. United States v Nance, 236 F.3d 820, 826 (7th Cir. 2000). Thus, the error in failing to submit the drug quantity determination to the jury was harmless beyond a reasonable doubt. See King, 272 F.3d at 379-80 (error did not affect substantial rights of defendant--i.e., was harmless-where one package seized by police contained an amount sufficient to trigger the enhanced penalties of § 841(b)(1)(A)); United States v. Booker, 260 F.3d 820, 823 (7th Cir. 2001) ("We are also confident, given that the police actually recovered amounts in excess of 50 grams, that a jury which convicted Booker would have been compelled to find that Booker's crimes involved in excess of 50 grams of crack cocaine."); United States v. Nealy, 232 F.3d 825, 830 (11th Cir. 2000) (failing to submit drug quantity determination to jury harmless where defendant was sentenced to enhanced range

based on 5 grams or more of crack cocaine and it was undisputed that police seized 14.8 grams from defendant's home). Accordingly, the Court should conclude that defendant is not entitled to relief on his Apprendi claim. fn2

F. Conclusion

In view of the foregoing, the Court should conclude that defendant has not established his entitlement to relief under § 2255 because his claims ineffective assistance of counsel claims are without merit, and because any Apprendi error was harmless beyond a reasonable doubt. Accordingly, the Court should deny defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. Thomas v. Arn, 474 U.S. 140 (1985); Howard v. Secretary of Health & Human Servs., 932 F.2d 505 (6th Cir. 1991); United States v. Walters, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. Willis v. Secretary of Health & Human Servs., 931 F.2d 390, 401 (6th Cir. 1991); Smith v. Detroit Federation of Teachers Local 231, 829 F.2d

1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

PAUL J. KOMIVES
UNITED STATES MAGISTRATE JUDGE

Dated: Jan. 24, 2002

Footnotes

fn1 A third reason for rejecting this claim is that "a guilty verdict does not require jury unanimity regarding the type of drugs involved." United States v. Wiggins, 104 F.3d 174,177 (8th Cir. 1997); see also, Horton v. United States, 244 F.3d 546, 552 (7th Cir. 2001); cf. United States v. Vincent, 20 F.3d 229, 235-36 (6th Cir. 1994) (specific type of firearm used is not an element of offense of using a firearm in relation to a drug offense). It is true that when "defendants are convicted by a verdict that is ambiguous as to what type of drug they possessed or distributed, they may not be sentenced based upon the alternative producing the higher sentence range." Wiggins, 104 F.3d at 177-78. Further, the type of drug involved may need to be proved to a jury beyond a reasonable doubt in some circumstances under the Supreme Court's decision in

Apprendi. However, as discussed below, defendant cannot benefit from the Apprendi decision, and "when trial evidence leaves no doubt as to the substance involved, it is not error to sentence a defendant consistent with that evidence." Wiggins, 104 F.3d at 178. Thus, the type of drug was not an element of the conspiracy offense, and defendant could be sentenced based on either drug in light of the jury's finding that he aided the distribution of both heroin and cocaine.

fn2 To the extent that defendant claims the Court erred in determining, based on a preponderance of the evidence, the amount of drugs involved for purposes of determining a sentence under the Guidelines within the statutorily prescribed range, the claim is without merit. Apprendi involves only those factors that alter the statutory range of punishment; it does not prohibit a judge from determining factors which affect the duration of a sentence imposed within that statutory range. See United States v. Fields, 251 F.3d 1041, 1043-44 (D.C. Cir. 2001); United States v. Robinson, 241 F.3d 115, 119 (1st Cir. 2001); United States v. Obi, 239 F.3d 662, 667 (4th Cir. 2001); United States v. Doggett, 230 F.3d 160, 165-66 (5th Cir. 2000); United States v. Aguayo-Delgado, 220 F.3d 926, 933-34 (8th Cir. 2000).